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IN THE

Supreme Court of the United States

No. 235 Term, 1948.

GLOBE SOLVENTS COMPANY,
Petitioner,

vs.

S. S. CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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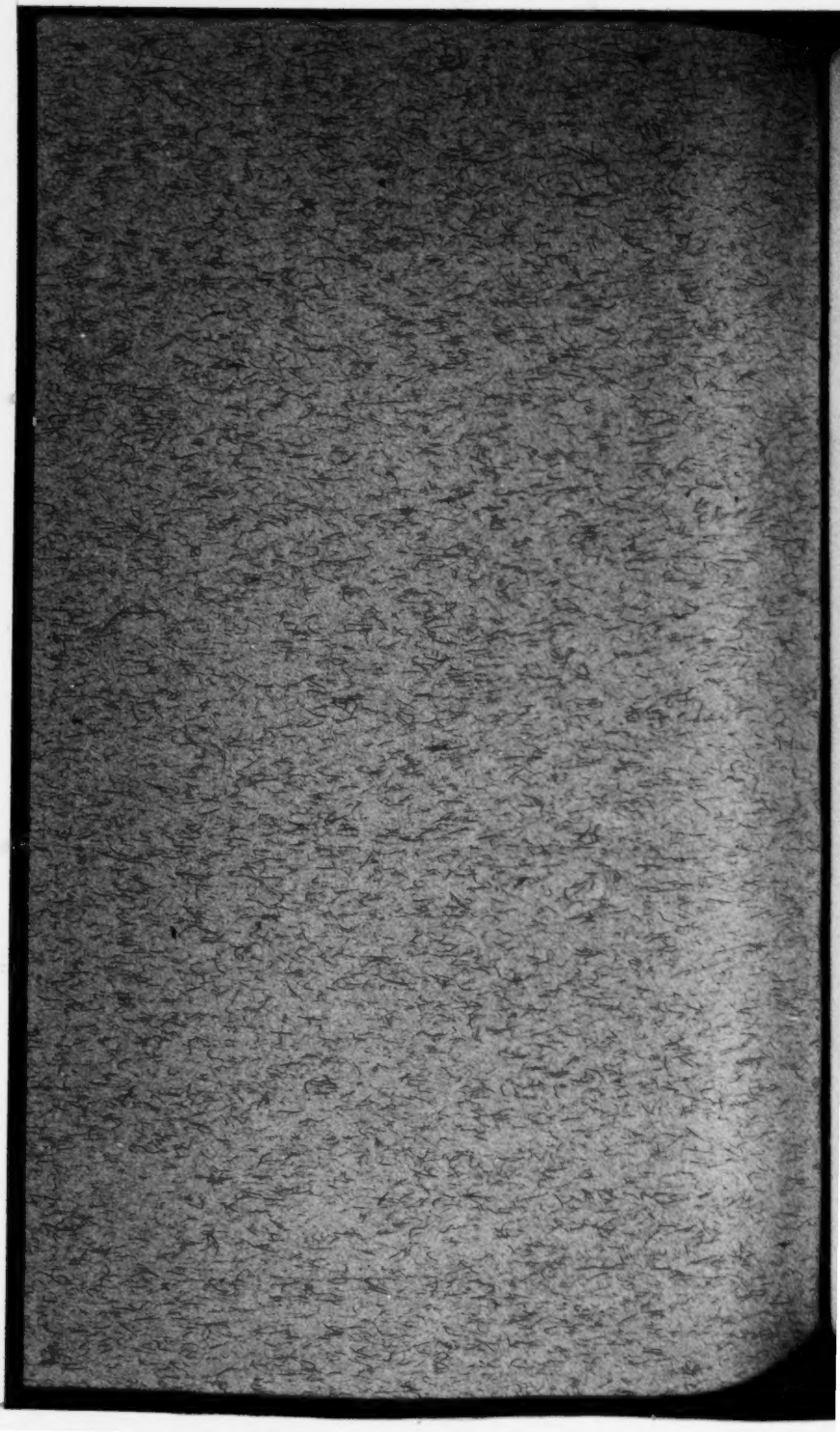

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. Term, 1948.

GLOBE SOLVENTS COMPANY,
Petitioner,

VS.

S. S. CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Globe Solvents Company, Inc., by its attorney, Peter P. Zion, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Third Circuit in the above entitled case, reversing a judgment of the United States District Court for the Eastern District of Pennsylvania, which judgment and decision was rendered by the Circuit Court of Appeals on April 21, 1948.

The appeal in the Circuit Court of Appeals was taken from the judgment of the United States District Court for the Eastern District of Pennsylvania, entered in favor of the libellant in the sum of $1227.18, with interest from January 16, 1941, and the costs of the action.

STATEMENT OF THE MATTER INVOLVED.

This case involves the burden of proof in an admiralty action and the nature and extent of the contract between a shipper and carrier, where goods are delivered by the shipper in good condition to the carrier and the carrier delivers the same goods in a changed condition.

THE ESSENTIAL FACTS.

Libellant, a manufacturer and distributor of lacquers and solvents, had contracts with the Navy Department for dope and lacquer which was to be shipped in five gallon cans and fifty-five gallon drums.

Libellant delivered the goods called for in said contracts to a Philadelphia pier for shipment by boat to the point of destination. Arrangements for shipping were made with the Quaker Line, and, at that time, it was not known what vessel would carry the cargo. This was due to war-time security requirements.

The cargo was inspected by a government inspector while libellant's president was present and the cargo left the plant

in good condition. It was crated according to Navy Specifications.

Libellant had no control over the cargo after it was deposited on the pier, nor a voice as to what vessel would carry it or in its manner of stowage on such vessel. The goods were subsequently shipped on or about January 16, 1941, on board the S. S. California and neither libellant nor any officer or member thereof received or saw the bill-of-lading until after the goods were at sea.

The cargo was stowed on deck on top of three layers of dunnage, three inches high with water-proof tarpaper over the top of the cases and with tarpaulins and dunnage on top. When the ship reached Norfolk the master of the carrier vessel ordered additional tarpaper be laid over the tarpaulins.

The vessel was deep loaded and it did not require much of a sea for the ship to take water on deck. Strong winds not unusual for that time of year were met on the voyage and water shipped on deck.

The consignee (U. S. Navy), notified the libellant from the point of destination that the cargo had arrived in a deplorable condition and had been rejected. A large part of the shipment was so rejected because of rusty and leaking cans and water-soaked cases. The containers were found to be extensively water-soaked; the cans were extremely rusty and the rust entered through the tin plating causing leakage. In the opinion of the surveyor, this was due to salt-water wetting.

Judge Welsh rendered a verdict for libellant after finding that the evidence was sufficient to sustain a finding of negligence on the part of the shipper. The negligence consisted of failure on the part of the carrier to use adequate and proper dunnage.

On appeal, the Circuit Court of Appeals for the Third Circuit reversed the judgment of the lower court on the grounds that the cargo was shipped on deck with the owner's consent at shipper's risk of damage or loss and that since libel-

lant must adduce evidence to support the findings of negligence on the part of the carrier, the evidence in the case would not sustain a finding of negligence.

O'Connell, J., dissented, holding that a carrier may not assign to a shipper the responsibility for proving negligence; that the findings of the District Court are entitled to great weight and that the finding of negligence of the court below was supported by substantial evidence.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, Sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on April 21, 1948.

QUESTIONS INVOLVED.

(a) Where a shipper delivers cargo in good condition to a carrier and the same cargo is delivered in defective condition, is not the burden of proof upon the carrier that the damage was not caused by its negligence or by an excepted peril recognized by law?

(b) Where such goods are shipped under a bill-of-lading which incorporates by its terms the Carriage of Goods by Sea Act, does not such Act apply even though the bill-of-lading also bears the notation "shipped on deck at owner's risk of loss"?

(c) On an appeal in admiralty, must not the Circuit Court of Appeals consider the facts de novo, at the same time give great weight to the findings of fact of the court below and refuse to make new findings in the absence of compelling evidence to the contrary?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A. In holding that the burden of proving negligence was on libellant, the Circuit Court of Appeals for the Third Circuit

1. has decided a federal question in a way probably in conflict with applicable decisions of the United States Supreme Court and of the Circuit Courts of Appeals of other Circuits.

Schnell vs. Vallescura, 293 U. S. 296, 55 S. Ct. 194, 79 L. Ed. 373;

James Richardson & Sons vs. Connors Marine Co., 141 F. (2d) 226 (C. C. A. 2);

The Rosalia, 264 F. 285;

The Folmina, 212 U. S. 354, 29 S. Ct. 363, 53 L. Ed. 546.

2. has divided, in its opinion, in that five judges (Follmer, Biggs, Goodrich, McLaughlin, Kalodner, J. J.) voted for reversal and one judge (O'Connell, J.) voted for affirmance. The case was originally heard by the Court Feb. 18, 1947. It was reargued at the Court's request on Dec. 17, 1947.

B. In holding that the Carriage of Goods By Sea Act did not apply to this shipment because the bill-of-lading also read "shipped on desk at owner's risk of loss," the Circuit Court of Appeals for the Third Circuit

1. has decided a federal question in a way probably in conflict with the applicable decisions of the Supreme Court of the United States and the Circuit Court of Appeals of other circuits.

Waterman S. S. Corp. vs. U. S. S. R. & M. Co., 155 F. (2d) 687 (C. C. A. 5), Cert. denied, 329 U. S. 761, 67 S. Ct. 115, 91 L. Ed. 656.

C. In failing to consider facts on appeal denovo and in failing to give the proper consideration to the findings of the trial court, the Circuit Court of Appeals for the Third Circuit

1. has decided a federal question contrary to the existing decisions of the United States Supreme Court and the Circuit Court of Appeals in other circuits.

The Mamei, 152 Fed. (2d) 924 (C. C. A. 3);
Crist vs. U. S. War Shipping Admin., 163 F. (2d) 145;
B'klyn Eastern Dist. Term. vs. U. S., 287 U. S. 170, 53 S. Ct. 103, 77 L. Ed. 240.

2. Has overlooked relevant testimony given at the trial.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, demanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case, numbered and entitled in its docket, October Term, 1946, No. 9221, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

And your petitioner will ever pray.

PETER P. ZION,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

Opinions were written by both the Circuit and District Courts. The opinion of the District Court appears in the appendix at pages 73a-80a and is reported in the official reports in 67 F. Supp. 719.

The opinion of the Circuit Court is attached to the appendix, and is reported in the official reports in 167 F. (2d), 859.

JURISDICTION.

The grounds on which jurisdiction of this court is invoked is set forth in the petition on page 4 thereof.

STATEMENT OF THE CASE.

The statement of the case appears in the petition at pages 2 to 4 and in the interest of brevity is not repeated here.

SPECIFICATION OF ERRORS.

The errors which petitioner will urge for Writ of Certiorari to be granted are that the Circuit Court of Appeals for the Third Circuit erred

1. In reversing the judgment of the District Court in favor of the libellant;

2. In holding the burden of proving negligence was on libellant;

3. In holding that under the provisions of the bill-of-lading "shipped on deck at owner's risk of loss" the only way in which libellant could recover was to prove the carrier was negligent in spite of the fact that the bill-of-lading also incorporated by reference the Carriage of Goods by Sea Act;

3. In failing to give sufficient weight to the findings of the fact by the trial court and in failing to consider the record de novo in an admiralty appeal.

STATUTE INVOLVED.

Carriage of Goods by Sea Act, 46 U. S. C. 1300, et seq.

ARGUMENT.

WHERE GOODS ARE DELIVERED TO A CARRIER IN GOOD CONDITION AND DELIVERED BY IT IN A DAMAGED CONDITION, THE BURDEN IS ON THE CARRIER TO PROVE THAT THE LOSS WAS NOT DUE TO ITS OWN NEGLIGENCE OR THAT IT WAS AS A RESULT OF ONE OF THE EXCEPTED PERILS.

It is an elementary principle of admiralty law that where cargo is delivered to a carrier in apparently good condition and the same cargo arrives at the point of destination in a damaged condition, it is incumbent upon the carrier to explain the cause of loss and to show that it brings itself within any of the exceptions relieving it from the liability which the law otherwise imposes.

In Schnell vs. The Vallescura, 293 U. S. 296, 55 S. Ct. 194, 79 L. Ed. 373, Mr. Justice Stone, writing for this court, said (page 303):

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him."

(Page 304):

> "The reason for the rule is apparent. He is a bailee intrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. * * * In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

(Page 305):

> "If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a prima facia case of liability. It is sufficient if the carrier fails to show that the damage is from an excepted cause to cast on him the further burden of showing that the damage is not due to failure to properly stow or care for the cargo during the voyage."

The same principle has been followed in James Richardson and Sons vs. Connors Marine Co., 141 F. 2nd, 226 (C. C. A. 2); the Rosalia, 264 F. 285; the Folmina, 212 U. S. 362, 29 S. Ct. 363, 53 L. Ed. 546.

In the instant case, the evidence showed the goods were delivered to the Philadelphia pier in good condition and they arrived at the point of destination, after being carried by respondent, in a damaged condition. It was incumbent, therefore, upon the carrier to explain away the reasons for such damage or to bring it within one of the excepted perils recognized by law. This it clearly failed to do, as a reading of the record indicates.

At no time was the burden of proving negligence on the part of the carrier upon the libellant, since the carrier never gave a satisfactory explanation as to the cause of the loss. In this respect, the finding for the libellant by the District Court was entirely justified by the evidence given at the trial.

THE CARRIAGE OF GOODS BY SEA ACT APPLIED TO THE SHIPMENT IN THE CASE AND THE NOTATION IN THE BILL-OF-LADING "CARRIED ON DECK AT SHIPPER'S RISK OF LOSS" DID NOT RELIEVE THE CARRIER FROM HIS BURDEN OF PROOF.

It is the contention of the respondent in this case that the bill-of-lading (which was not delivered to shipper and which it did not see until the goods were out at sea) relieved it from the rule of law above cited because the bill-of-lading bore the legend "shipped on deck at owner's risk of loss."

The bill-of-lading which was introduced into evidence incorporated in its terms by reference, the Carrier of Goods by Sea Act.

It is admitted that that Act by its own terms does not apply ordinarily to goods which are shipped on deck pursuant to contract between shipper and carrier and this would be the rule in this case were it not for the additional factor that the other legend "shipped on deck at owner's risk of loss" also appears on the bill-of-lading.

The Circuit Court of Appeals for the Fifth Circuit had occasion to consider an identical situation in *Waterman S. S. Corporation vs. United States S. R. & M. Co.*, 155 F. (2nd) 687, which involved a shipment of steel, some of which was shipped on deck with permission granted by a bill-of-lading. The bill-of-lading also incorporated by reference the Carriage of Goods by Sea Act, as was the situation in the instant case, and it also bore the notation that the goods were carried on deck at owner's risk of loss. During the voyage, heavy seas were encountered and water shipped on deck, and as a result, thirteen pieces of steel were lost. The court pointed out (page 690):

> "The bill-of-lading incorporates by reference the provisions of the United States Carriage of Goods by

Sea Act. While the Act does not apply either to carriage of goods not in foreign trade or to cargo carried on deck under provisions of the bill-of-lading for on deck carriage, the parties may by the terms of their bill-of-lading agree that its provisions shall apply to cargo carried on deck between ports of the United States. Section 4 (2) of the Act provides that 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * Perils * * * of the sea * * *; [or] (p) latent defects * * *.'

Upon the carrier is placed the burden of going forward to show a peril of the sea or a latent defect; it also has the risk of non-persuasion."

The Circuit Court of Appeals for the Fifth Circuit affirmed a judgment for the libellant rendered by the Court below and this Court denied certiorari in 329 U. S. 761, 67 S. Ct. 115, 91 L. Ed. 656.

The instant case is on all fours with the case just cited. Here, too, the bill-of-lading incorporated by reference the Carriage of Goods by Sea Act and here, too, the bill-of-lading bore the notation that the goods were being shipped on deck at owner's risk of loss. It must follow, therefore, that in such a case the Carriage of Goods by Sea Act does apply and that the burden is on the carrier to show that the loss was occasioned by one of the excepted perils incorporated in that Act.

It was never in question in this case that the heavy weather met on the voyage was not a peril of the sea as defined by the Carriage of Goods by Sea Act, and, therefore, the carrier never met the required burden upon it to show that the loss was occasioned by an excepted peril or some other cause not attributable to its own negligence.

IN AN ADMIRALTY APPEAL, THE CIRCUIT COURT MUST CONSIDER THE RECORD DENOVO AND MUST ALSO GIVE GREAT WEIGHT TO THE FINDINGS OF FACT OF THE COURT BELOW.

It has many times been announced by both the Supreme Court of the United States and the Courts of the various Circuits that in an admiralty appeal, the court above must review the record de novo and, at the same time, give great weight to the findings of the court below.

In Crist vs. U. S. War Shipping Administration, 163 F. (2nd) 145 (C. C. A. 3) the court said, at page 146:

> "Preliminarily, it must be kept in mind that an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the district court; that the findings of the latter when supported by competent evidence are entitled to great weight and that such findings should, therefore, not be set aside on appeal except on showing they are clearly wrong."

In the Mamei, 152 Fed. 2nd 924 (C. C. A. 3) the Circuit Court of Appeals for the Third Circuit held (page 926):

> "We have reviewed the record de novo as required, * * * bearing in mind that fact findings of the District Court, when supported by competent evidence, are entitled to great weight and should not be set aside except under a showing that they are clearly wrong."

In Brooklyn Eastern District Terminal vs. United States, 287 U. S. 170, 53 S. Ct. 103, 77 L. Ed. 240, Mr. Justice Cardoza writing for this Court said (page 176):

> "In admiralty, an appeal to the court of appeals is deemed to be a trial de novo."

The lower court in this case found negligence in the stowage of the cargo involved in that the dunnage was insufficient under the circumstances. The master of the appellant testified that the vessel was

> "deep loaded and would not take much of a sea to get over and take water on deck."

Clearly, the carrier was not justified in loading the cargo on such a deep loaded ship in such a manner that it was likely to be exposed to corrosion by sea water. Weather encountered on the voyage was expected and normal for the time of year and failure of the carrier, under the circumstances, to raise the cargo in question to a sufficient height that it would not be washed by sea water coming over the deck, was clearly negligence.

It may be taken from the dissenting opinion of O'Connell, J., that the Circuit Court of Appeals for the Third Circuit did not, as it was required to do, consider the proceeding de novo. In his opinion, Judge O'Connell said:

> "I believe that where, as here, this court rejects the lower court's findings of fact, it then becomes imperative upon this court as one proceeding de novo to consider the whole record * * * assuming *aurguendo* that the lower court's findings of fact as to the cause of damage were not supported by the evidence, can we dismiss this cause without a finding that the stowage of the cargo during the voyage from Philadelphia to Norfolk was sufficient, under the circumstances, in the light of the action taken by the carrier at the latter port."

As is pointed out by the Judge in the dissenting opinion, the majority opinion has in effect vacated the decree of the District Court yet did not review the whole record de novo as it was required to do under the cited cases. Even conceding that the Circuit Court was correct in overruling such findings of fact of the lower court, it then had a duty to

consider the whole record de novo and this it evidently failed to do.

CONCLUSION.

It is, therefore, submitted that for the foregoing reasons, your honorable court should grant the petition for certiorari.

Respectfully submitted,

PETER P. ZION,
Attorney for Petitioner.

OPPOSITION

BRIEF

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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 235.

October Term, 1948.

GLOBE SOLVENTS COMPANY,
Petitioner,

v.

S. S. CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

THOMAS E. BYRNE, JR.,
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IN THE

Supreme Court of the United States.

No. 235. OCTOBER TERM, 1948.

GLOBE SOLVENTS COMPANY,
Petitioner,

v.

S. S. CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

COUNTER STATEMENT OF THE FACTS.

We do not accept the statement of facts in the Petition and before proceeding to answer the Petition, it is necessary that we make a counter statement.

This is an action in rem brought against the Steamship "California" by Petitioner, which shipped a cargo of lacquer solvents from Philadelphia to San Diego. The shipment was packed in two types of containers but we are here concerned only with loss which occurred to that portion of the shipment which was packed in the familiar five gallon tins. The tins were packed two to a wooden crate, referred to in the testimony as "made of wood shooks" (R. 24).

The cargo was packaged by the Petitioner and its employees delivered it to the pier for shipment. The material was inflammable and each container had affixed to it a "red label" at the time it was delivered to the pier for shipment. At that time, the Respondent issued a dock receipt (R. 51). Written across the face of the dock receipt was the legend "red label cargo." The significance of the label is adequately explained in the Opinion of the Circuit Court.

Thereafter the Respondent loaded the shipment on the deck. It was placed on three layers of dunnage boards, each one inch high. It was exceptionally well-covered and fastened (R. 19, 20, 41-43) and we are not here concerned with any damage caused by crushing or shifting which might indicate that the shipment was not properly secured.

The contract between the parties was contained in a bill of lading issued by Respondent. That contract had on its face the statement "Carried on Deck Owners Risk of Damage Or Loss." The bill of lading was marked non-negotiable and was not the customary negotiable document (R. 50). Petitioner is the shipper and not an innocent purchaser of the bill.

It is not correct for the Petitioner to state that it did not know what vessel would carry its shipment because of wartime security requirements (Petition 2). The events here occurred in January and February of 1941. There were no security restrictions and the name of the carrying vessel appeared on the dock receipt issued before loading. As the Court below points out, the Petitioner made no special arrangements with respect to the shipment (R. 61). Petitioner could, of course, have had its cargo stowed underdeck in one of the vessel's regular cargo carrying compartments had it been willing to pay the freight charges for the entire compartment.

The Petitioner had been making shipments by ocean-going steamers for a number of years (R. 11). It is not correct for the Petitioner to state (Petition 3) that it neither received nor saw the bill of lading until after the goods were at sea. In the first place the Record shows the Petitioner's President was its only witness on the subject and he testified that he did not bother with these bills of lading (R. 11). That witness testified that he did not know when the bill of lading had been received but hazarded a guess that it must have been mailed to his Company (R. 10). That, of course, is the Petitioner's fault, not Respondent's. If the Petitioner was not interested enough

to inquire as to the terms of the contract of carriage, or where its cargo would be stowed, it cannot charge the Respondent for that. In addition, the Record and the Opinion of the Court below indicate clearly that Petitioner must have known from past experience and familiarity with shipping regulations that the shipment would be loaded on deck unless some other arrangement was made. This is so because it affixed to each package the "red label" required by the Department of Commerce Regulations, Cumulative Supplement to Code of Fed. Reg. of the U. S., Title 46, § 146.05-15 (g) (1), promulgated pursuant to Statute, 46 U. S. C. A. 170 (6a-7a). If Petitioner knew that part of the Regulations requiring the red label, it must also have known that red label cargo had to be carried on deck unless some special arrangement was made.

Upon arrival of the shipment at San Diego it was found that the lower tiers (R. 46) of the stow had apparently been wet by sea water which washed the deck. This caused rusting of the tins and a portion of the shipment was lost through the resulting pin holes (R. 24) due to corrosion. Another portion of the loss alleged was the cost of repacking and replacing some of the tins which were rust-stained and not acceptable to the consignee.

ARGUMENT.

Petitioner has specified three reasons in support of his application for a writ of certiorari. We will take them up in the order presented by the Petition.

A. There Is No Conflict Between the Decision of the Court Below and Any Other Decision.

It is necessary to bear in mind that in the case at bar the bill of lading specifically stipulated that the cargo was to be carried on deck.

Petitioner asserts that there is a conflict between the Circuits and cites cases (Petition, 6) which he asserts support that statement. Not one of the cases there cited involves a shipment which was to be carried on deck. The rules of liability which Courts have applied with respect to cargo carried inside a vessel are not and cannot be the same as those applicable to a shipment which is carried on deck unless, of course, it be carried on deck without permission and under a negotiable bill of lading. We take it that Petitioner does not contest that portion of the Opinion of the Court below which states that it now concedes that placing the cargo on deck was not per se negligence; and that Petitioner assented to its being carried there when it attached the red label and made no special arrangements for the shipment.

There is naturally a greater risk from damage by the elements to goods carried on deck than if the same goods were carried below deck in a watertight compartment. As this Court said in *Laurence v. Minturn,* 58 U. S. 58:

> ". . . the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.
>
> There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owners."

Congress recognized the distinction when, in 1936, it passed the Carriage of Goods by Sea Act, 46 U. S. C. A. 1301. § 1 specifically excepts from that Act cargo "which by the contract of carriage is stated as being carried on deck and is so carried." See also *Davidson v. Flood Bros.*, 30 F. (2d) 279 (CCA 9). Knauth, Ocean Bills of Lading, 1947 Edition, page 193, indicates that this is the modern view and the one observed in practice in the industry.

Rather than being in conflict with the decision of this Court in *The Vallescura*, 293 U. S. 296, the rule applied by the Court below is in accord with it. This Court said in that case that if a carrier "delivers a cargo damaged by causes unknown or unexplained, . . . he is subject to the rule applicable to all bailees."

The cause of damage in the case at bar is neither unknown nor unexplained. It was caused by sea water washing the deck of the vessel during the voyage. This occurred in spite of the fact that the *only* testimony in the Record with respect to the stowage and dunnage is that it was adequate (R. 20).

The trouble with Petitioner's argument on the point is that it simply will not recognize the cause of the loss. That was contained in the Libellant's own proofs (R. 25) and the case clearly comes within the language of this Court in *The Folmina*, 212 U. S. 354:

> "Of course, where goods are delivered in a damaged condition plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be prima facie within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier."

See also *The Vallescura*, 293 U. S. 296 at 302; *The Isla De Panay*, 292 F. 723 at 728-9, affirmed 267 U. S. 260; *Thomas Roberts & Co. v. Calmar S. S. Corporation*, 59 F. Supp. 203.

B. Whether the Carriage of Goods by Sea Act Does or Does Not Apply to This Shipment Cannot Change the Result.

Petitioner argues that the Court below erred in failing to apply the provision of the Carriage of Goods by Sea Act to this "on deck" shipment. It is difficult for us to see how a statute which is incorporated by reference in a printed bill of lading can be made to apply to "on deck" cargo when the Act itself specifically excluded "on deck" cargo from its provisions, 46 U. S. C. A. 13. The bill of lading covering this case was a standard form. If the Carriage of Goods by Sea Act had been printed on it instead of being incorporated by reference, then the bill of lading would have contained a specific exception as to cargo carried on deck.

The Court below recognized that fact and while it discussed the Act, it did not attempt to apply it because of the exception. The legend on the face of the bill of lading "loaded on deck owner's risk of damage or loss" is an exception which § 6 of the Carriage of Goods by Sea Act, 46 U. S. C. A. 1306, permits the carrier to take provided it issues a non-negotiable document. That the Respondent did. Having done so, it was at liberty to make any contract with Petitioner which was not contrary to public policy, Carriage of Goods by Sea Act, § 6, supra.

It is therefore clear that no matter from which angle the Petitioner approaches the problem he is met with very clear law which defeats his right of recovery without a finding that the carrier has been negligent. We would make it very clear to this Court that we do not dispute that had there been competent evidence in the Record to support a finding of negligence on the part of Respondent which caused damage to Petitioner's cargo, Respondent would have been liable.

The present case really turns upon a question of fact. The Opinion of the Dissenting Judge in the Court below proceeds on the theory that there was evidence to support a finding of negligence. Here a six judge Circuit Court

has examined the Record and five Judges have held that there is no evidence to support a finding of negligence.

The Dissenting Judge in the Court below differed on the fact findings. He also felt that the burden of proceeding with the evidence should not be upon Petitioner. With all due respect to the Dissenting Judge (O'Connell, J.), we think he failed to consider an important fact. Judge O'Connell treats the case as one where, by inserting an exception in a bill of lading, the carrier can escape liability. That is not so. Contracts of carriage have always been subject to some exceptions. With respect to ocean carriage, Congress has regulated the exceptions. The one on the face of this bill of lading was perfectly valid. Where Judge O'Connell errs, in our opinion, is in overlooking the fact that even with respect to such valid exceptions as the law permits a carrier to take, it still has the initial burden of showing facts which bring the laws within the exception. Then and only then does the cargo owner have the burden of proceeding with evidence to support a finding of negligence. Here the Petitioner's own proofs showed the cause of damage (R. 25). It is one of the risks inherent in carrying cargo on deck that it will become wet. Thus, Petitioner brought itself squarely within the above-quoted language of this Court in *The Folmina, supra.* The damage was prima facie within the exception and this Court and lower courts have frequently stated the rule.

The Petition (p. 10) refers to and quotes from this Court's Opinion in *The Vallescura,* 293 U. S. 296 at 303. The quotation is not complete. In full, it reads as follows:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th.) c. 1. This rule applies equally with respect to other exceptions for which the law permits him to stipulate." • • •

> *"It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril."* (Italics ours.)

That is the accepted law and the Circuit Court applied it. See also *The Folmina, supra; The Malcolm Baxter, Jr.*, 277 U. S. 323 at 334; *Thomas Roberts & Co. v. Calmar S. S. Corporation*, 59 F. Supp. 203; *Globe Distributing Company v. Monte Iciar*, 167 F. (2d) 334.

The one case cited by the Petition and supporting brief which concerns cargo carried on deck is *Waterman S. S. Corporation v. United States Smelting, Refining & Mining Co.*, 155 F. (2d) 687. Far from being in conflict with the decision below or with the position of this Respondent, it supports both. The situation there was quite different. There the loss occurred because of the failure of a piece of ship's equipment. There was no evidence as to the cause of the failure. As the Court there said:

> "The record discloses no evidence on the subject of a latent defect. The carrier merely argues, 'A reasonable explanation of the cause of the straightening out of the pelican hooks is that a latent defect existed in them.' "

The Court concludes: "Conjecture will not be permitted to take the place of proof."

In our case, the carrier proved all the details of the stowage and that the stowage and protection afforded the cargo were adequate (R. 20). In other words, the carrier here carried its burden and Petitioner introduced *no* evidence on the subject.

C. Petitioner Complains That It Did Not Receive a Trial De Novo in the Circuit Court. Its Real Complaint Is That on the Trial De Novo the Court Below Found for Respondent.

The third reason advanced by Petitioner for allowance of the writ hardly seems to us to require answer. As we read Petitioner's Point "C" (Petition 5), it seems to contain an inherent contradiction. Trial *de novo* implies the right to find facts. The Circuit Court cannot be bound to follow those found by the District Court. Otherwise, trial *de novo* would be meaningless. Petitioner is really complaining that upon full review, the Court of Appeals found for Respondent and not for Petitioner.

CONCLUSION.

Under the Harter Act, 46 U. S. C. A. 192 et seq., any exception which does not attempt to relieve the carrier of the consequences of its own negligence is valid. The carrier had the initial burden of bringing the loss within the exception. The Carriage of Goods by Sea Act, 46 U. S. C. A. 1300 et seq., limited the exceptions which the carrier could take but the initial burden remains as before. Petitioner here proved only that its cargo had been damaged to the extent of $1227.18 by sea water. Respondent proved due care in addition to its reliance upon Libellant's proof to bring the damage within the exception. The only purpose which review by this Court would have would be to permit this Court to re-examine the evidence to find whether it supports the fact findings of the Court below.

It is respectfully submitted that the Petition should be denied.

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